IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CRESCENT POINT ENERGY CORP.,

Plaintiff,

v.

TACHYUS CORPORATION,

Defendant.

Case No. 20-cv-06850-MMC

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT; AFFORDING PLAINTIFF FURTHER LEAVE TO AMEND

Before the Court is defendant Tachyus Corporation's ("Tachyus") Motion, filed June 9, 2021, "to Dismiss First Amended Complaint." Plaintiff Crescent Point Energy Corp. ("Crescent Point") has filed opposition, to which Tachyus has replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court rules as follows.[1]

BACKGROUND

In its First Amended Complaint ("FAC"), Crescent Point alleges that it is an "oil producer" (see FAC ¶ 1), that Tachyus provides "software" services (see id.), and that, on January 12, 2018, Crescent Point and Tachyus entered into a written contract (hereinafter, "the Agreement") (see FAC ¶ 29), under which Tachyus "grant[ed] Crescent Point the right to access and use Aqueon, powered by Data Physics, optimization software for waterflooding, and the associated professional services and support" (see Richmann Decl. Ex. B at 10).[2] According to Crescent Point, it entered into the Agreement

[1] By order filed August 10, 2021, the Court took the matter under submission.

[2] Tachyus's unopposed request that the Court take judicial notice of the three documents comprising the Agreement (see id. Exs. A-C) is hereby GRANTED.

in "reliance on Tachyus's description of its product offering and repeated assurances that its software could – and would – produce reliable results for Crescent Point's waterflooding operations to improve and enhance oil extraction" (see FAC ¶ 8), which statements, Crescent Point alleges, were "knowingly false representations" (see FAC ¶ 103).

The Agreement, bearing a "Start Date" of January 15, 2018, and an "End Date" of January 14, 2020, was to be performed in two phases. (See Richmann Decl. Ex. B at 10.) The first phase, referred to as the "Setup Phase" or, alternatively, the "Backtesting Phase," was, as of the time the parties entered into the Agreement, anticipated to last "3-4 months," and the second phase, referred to as the "SaaS Phase,"[3] compromised the remainder of the 24-month period. (See id.; FAC ¶ 61.) Under the Agreement, Crescent Point was to pay a monthly fee of $150,000, but Tachyus would not send the first invoice until the "end of Backtest." (See Richmann Decl. Ex. B at 10.) Additionally, the Agreement provided that "[n]o invoice" would issue "if Backtest results provide[d] no feasible opportunities." (See id.)

Crescent Point alleges that, prior to Tachyus's entering into the Agreement, Tachyus had only worked with customers who "utilize[d] vertical well drills for oil extraction" and that Tachyus had never worked with a company that, like Crescent Point, "use[d] horizontal well drills, engage[d] in fracking[,] or use[d] waterflooding to extract oil from tight reservoirs." (See FAC ¶ 20; see also FAC ¶¶ 2-3 (explaining differences between Crescent Point's oil fields and those of Tachyus's "then-existing customers").) According to Crescent Point, after the parties entered into the Agreement, Tachyus was unable to develop software that was "compatible with Crescent Point's wells" (see FAC ¶ 63), and that, on "numerous" occasions, "Crescent Point engineers would point out

[3] "SaaS" is a reference to "Software-as-a-Service," described in the Agreement as a "business model whereby customers receive a simple-to-understand invoice for each billing period" and that, unlike "traditional" licensing, "keeps the rates firm and fixed." (See id. Ex. B at 5.)

errors and failures within Tachyus's software, and, to each, Tachyus engineers would reply that they would look into the issue, but never once corrected any of the issues or failures" (see FAC ¶ 75).

Crescent Point also alleges that, although "the parties never progressed past the Backtesting Phase" (see FAC ¶ 80) and Tachyus had "not shown any feasible opportunities for meaningful financial upside for Crescent Point" (see FAC ¶ 82), Tachyus, in July 2018, "invoiced Crescent Point for $1,050,000," i.e., the fee for the first seven months (see id.). Crescent Point further alleges that, "in or around September 2018," it paid the invoice "due to an administrative error" (see id.), and, in September 2018, "notified Tachyus that it was putting the project on hold and ceasing efforts under the Backtesting Phase (Phase I) until further notice" (see FAC ¶¶ 85-86). Additionally, Crescent Point alleges that although, in February 2019, it advised Tachyus of Tachyus's "breaches" (see FAC ¶ 88), and, in July 2019, it "provided further written notice that Tachyus was in breach" (see FAC ¶ 90), Tachyus took "no steps to deliver Crescent Point a workable software or to otherwise cure any of the breaches that Crescent Point identified" (see FAC ¶ 98).

Based on the above allegations, Crescent Point asserts five Causes of Action, titled, respectively, "Fraud in the Inducement," "Breach of Written Contract," "Breach of the Duty of Good Faith and Fair Dealing," "Unfair Competition (Cal. Bus. & Prof. Code § 17200) – Fraudulent and Unfair Business Practices," and "Unjust Enrichment."

LEGAL STANDARD

Dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). Rule 8(a)(2), however, "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). Consequently, "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual

allegations." See id. Nonetheless, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." See id. (internal quotation, citation, and alteration omitted).

In analyzing a motion to dismiss, a district court must accept as true all material allegations in the complaint and construe them in the light most favorable to the nonmoving party. See NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). "To survive a motion to dismiss, a complaint must contain sufficient factual material, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). "Factual allegations must be enough to raise a right to relief above the speculative level[.]" Twombly, 550 U.S. at 555. Courts "are not bound to accept as true a legal conclusion couched as a factual allegation." See Iqbal, 556 U.S. at 678 (internal quotation and citation omitted).

DISCUSSION

By order filed April 13, 2021, the Court granted Tachyus's motion to dismiss the initial complaint and dismissed that pleading with leave to amend. Crescent Point subsequently filed its FAC, which, by the instant motion, Tachyus contends is subject to dismissal. The Court considers in turn the five Causes of Action alleged in the FAC.

A. First Cause of Action

In the First Cause of Action, titled "Fraud in the Inducement," Crescent Point alleges it entered into the Agreement in reliance on twelve assertedly false statements made by Tachyus prior to the date on which the Agreement was executed.

Under California law,[4] "[a]n action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract." See Lazar v. Superior Court, 12 Cal. 4th 631, 638 (1996). To support such a claim, the plaintiff must allege that "the defendant knowingly made a false statement," that "the defendant thereby intended to

[4] The parties agree California law governs Crescent Point's claims.

induce the plaintiff to act to his detriment in reliance upon the false representation," and that "the plaintiff actually and justifiably relied upon the defendants' misrepresentation in acting to his detriment." See Conrad v. Bank of America, 45 Cal. App. 4th 133, 157 (1996). Additionally, the plaintiff must comply with Rule 9(b) of the Federal Rules of Civil Procedure, which Rule requires the plaintiff to "state with particularity the circumstances constituting fraud," see Fed. R. Civ. P. 9(b); specifically, the plaintiff must plead "the who, what, when, where, and how of the misconduct charged," see Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal quotation and citation omitted), as well as "evidentiary facts" that establish the assertedly false or misleading statements were "untrue or misleading when made," see Fecht v. Price Co., 70 F.3d 1078, 1082 (9th Cir. 1995).

1. Statements Allegedly Contained in "Case Study Executive Summary"

Crescent Point alleges that eight of the twelve statements on which it bases its fraud claim, namely, the statements to which it refers as False Statements #1, #2, #3, #5, #6, #7, #10, and #11, are contained in a "Case Study Executive Summary" (hereinafter, "Case Study"),[5] which document, Crescent Point alleges, was attached to an email sent November 16, 2017, by Jeff McNamara ("McNamara"), "Vice-President of Tachyus North America," to Ryan Sinclair ("Sinclair"), Crescent Point's "Manager, Reservoir Engineering." (See FAC ¶¶ 21, 31, 33, 35, 39, 43, 45, 54, 56, Richmann Decl. Ex. A at 9.)

a. "False Statement #1"

Crescent Point alleges the Case Study "represented that Tachyus's software could use machine learning to quickly and efficiently create forecasts of oil production by predicting and optimizing the pressure with which Crescent Point conducted its

[5] Tachyus's unopposed request that the Court take judicial notice of the "Case Study" (see Richmann Decl. Ex. J) is hereby GRANTED. Although the actual title of the document is "Tachyus Data Physics Optimization Software," the Court, in referring to the document, will use "Case Study," the title used by both parties.

waterflooding, the injection rates and speeds it used, and how Crescent Point could maximize oil extraction on its reservoirs." (See FAC ¶ 31.)

As Tachyus points out, however, the Case Study includes no such statement. Although Crescent Point, in its opposition, argues that Rule 9(b) does not prohibit a party from "paraphras[ing]" a statement alleged to be false (see Pl.'s Opp. at 21-22), the Ninth Circuit requires a plaintiff alleging fraud to allege the "specific content of the false representations," see Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (internal quotation and citation omitted), and, consistent therewith, district courts have found allegations "paraphras[ing]" statements asserted to be false "lack the specificity required by Rule 9(b)," see Wenger v. Lumisys, Inc., 2 Fed. Supp. 2nd 1231, 1246-47 (N.D. Cal. 1998) (finding "impressionistic approach to pleading fraud deficient"); see also Gross v. Symantec Corp., 2012 WL 3116158, at *3-5 (N.D. Cal. July 31, 2012) (holding fraud claims subject to dismissal where plaintiff paraphrased statements allegedly located on defendant's website; finding resolution of plaintiff's claims "turn[ed] on how [defendant's] representations compare[d] to the actual functionality of its software" and complaint failed to identify what defendant "actually said regarding the functional capabilities of its software" (emphasis in original)).

Moreover, even if, in some circumstances, a plaintiff's paraphrasing of an allegedly false statement might comply with the specificity requirement set forth in Rule 9(b), in the instant case, Crescent Point's allegations fail to provide Tachyus with the requisite notice of what it characterizes as "False Statement #1." The Case Study makes no reference to Crescent Point; rather, it generally describes in its first three pages Tachyus's Data Physics software product, and then sets forth in the next three pages specific results achieved by clients who used Tachyus's software, followed by a short conclusion section in its last, the seventh, page. (See Richmann Decl. Ex. J.) None of the statements, whether providing general descriptions of Tachyus's services or particular results achieved by users, are at all similar to "False Statement #1"; indeed, the Case Study does not use in any manner the terms "machine learning, "pressure," "waterflooding," or

"injection rates."

Accordingly, to the extent the First Cause of Action is based on "False Statement #1," the claim is subject to dismissal.

b. "False Statement #2"

Crescent Point alleges the Case Study "guaranteed that Tachyus's software could complete fieldwide 15-year, 1,000 well forecasts for Crescent Point in less than fifteen minutes." (See FAC ¶ 33.)

As noted, the Case Study makes no reference to Crescent Point. The language in the Case Study on which Crescent Point apparently relies, however, is the fourth sentence in the first paragraph of the Case Study, which paragraph states as follows:

> Tachyus Data Physics™ software empowers engineers to quantitatively optimize their reservoir injection plans. The fundamental advantage of Tachyus is the speed at which engineers can create forecasts using Data Physics' patent-pending, modeling technology. Data Physics modeling is a physics-based modeling technique that honors mass and energy balances by solving the governing fluid flow equations with a modified neural network. As a consequence, Data Physics models can produce full-field, 15 year, 1000 well forecasts in 15 minutes. Data Physics models combined with patent-pending Metamodel Assisted Memetic Algorithms enable users to generate thousands of operational scenarios and find the pareto efficient strategy for optimizing their chosen objectives.

(See Richmann Decl. Ex. J at 1.)

Crescent Point's claim is dependent on the theory that the fourth sentence in the above-quoted paragraph is, in Crescent Point's words, a "guarantee[ ]" that Crescent Point would obtain the type of forecasts Tachyus describes therein. The Case Study, however, also states on the same page that Tachyus's contracts with its clients are "split into two phases," that during the first phase, the "Setup" phase, Tachyus, inter alia, "tun[es] initial models," and that if, at the end of the first phase, "predictivity cannot be demonstrated," the "customer has no commitment to continue." (See id.) In other words, the Case Study expressly discloses that some customers may not experience "predictivity" from use of Data Physics models. Under such circumstances, Crescent Point has failed to allege sufficient facts to support a finding that the challenged statement was false.

Accordingly, to the extent the First Cause of Action is based on "False Statement #2," the claim is subject to dismissal.

c. "False Statement #3"

Crescent Point alleges the Case Study "stated that the 'fundamental advantage of the Tachyus technology is the speed at which engineers can create forecasts using Data Physics' patent-pending, modeling technology,' promising that its model 'require[s] only days to set up' and 'offer[s] long-term predictive capacity even when historical data is sparse or missing.'" (See FAC ¶ 35 (alterations in FAC).)

The first of the three quoted statements comprising "False Statement #3" is included in the Case Study, i.e., the statement that "[t]he fundamental advantage of the Tachyus technology is the speed at which engineers can create forecasts using Data Physics' patent-pending, modeling technology." (See Richmann Decl. Ex. J at 1.) As Crescent Point does not allege Data Physics cannot create forecasts, its claim of falsity appears to be based on Tachyus's use of the word "speed." Even assuming the above-quoted statement reasonably can be understood as a promise that all engineers can quickly create forecasts using Data Physics, however, Crescent Point fails to sufficiently allege facts to support a finding that the statement was false when made. Although Crescent Point alleges that "it took the Parties over four months – longer than the entirety of the promised Backtesting Phase – just to get Crescent Point's data transferred to Tachyus," it does not allege any facts to support a finding that Tachyus never intended to provide results at greater speed. See Conrad, 45 Cal. App. 4th at 157 (holding "claim of fraud based upon the alleged failure to perform a promise" requires showing "promisor did not intend to perform at the time the promise was made"); Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Ass'n, 55 Cal. 4th 1169, 1183 (2013) (holding "intent element of promissory fraud entails more than proof of an unkept promise or mere failure of performance").

With respect to the remaining statements comprising "False Statement #3," i.e., the second and third quoted statements, those statements, as Tachyus points out, do not

appear in the Case Study. Nor, to the extent Crescent Point contends in its opposition it has paraphrased statements in the Case Study, has Crescent Point identified the portion or portions of the Case Study it is paraphrasing, and it is not evident from the Case Study what statement(s) therein Crescent Point is attempting to paraphrase. Indeed, the Case Study states that the "Setup" phase "span[s] four months" (see Richmann Decl. Ex. J at 1), not "only days" as Crescent Point appears to claim the Case Study stated, and the Case Study does not use in any manner the terms "long-term predictive capacity" or "historical data."

Accordingly, to the extent the First Cause of Action is based on "False Statement #3," the claim is subject to dismissal.

d. "False Statement #5"

Crescent Point alleges the Case Study "stated that Tachyus's Data Physics software, when fed with a large sample set of data, would learn how to match previous historical data and then forecast future production based on optimized operating conditions by deploying its 'closed-loop system,'" and that it "described Tachyus's closed-loop system as an automatic, self-sufficient optimizer and predictor that can develop suggestive and informative waterflooding operations with little historical data and validate predictive capacity by continuously 'ingest[ing] new data [such that] the updated models optimize reservoir management decisions such as injection redistribution, in real time throughout the life of the [oil] field." (See FAC ¶ 39 (alterations in FAC).)

As Tachyus again points out, the Case Study does not include the above-quoted language. Although Crescent Point again contends Rule 9(b) allows it to paraphrase statements, "False Statement #5" fails to sufficiently identify the actual statement on which Crescent Point relies. Indeed, the Case Study does not use, in any manner, the phrases "fed with a large sample set of data," "historical data," "optimized operating conditions," "waterflooding operations," "ingesting new data," "optimize reservoir management decisions," or "injection redistribution," nor does it describe Tachyus's "closed-loop system" as "an automatic, self-sufficient optimizer."

Accordingly, to the extent the First Cause of Action is based on "False Statement #5," the claim is subject to dismissal.

e. "False Statement #6"

Crescent Point alleges the Case Study "represented that Tachyus's software required very little customer intervention in order to work successfully, and that even during the more intensive setup phase of the software development process, customers only needed to provide 'as little as 3 man hours/week' to get the software up and running." (See FAC ¶ 43.)

As Tachyus points out, with the exception of the phrase "as little as 3 man hours/week," the other language comprising "False Statement #6" is not included in the Case Study; indeed, the Case Study makes no reference to the amount of "customer intervention" required, and, consequently, Crescent Point has, to that extent, failed to identify a false statement. With regard to the phrase "as little as 3 man hours/week," the Case Study states: "Customer time during [the Setup] phase can be as little as 3 man hours/week depending on the environment" (see Richmann Decl. Ex. J at 1 (emphasis added)); the Case Study does not state that all customers will need to provide only 3 man hours per week.

Accordingly, to the extent the First Cause of Action is based on "False Statement #6," the claim is subject to dismissal.

f. "False Statement #7

Crescent Point alleges that the Case Study includes a statement by Tachyus "representing that its Data Physics software allowed for 'rapid adoption with minimal time and IT investment' by the customer." (See FAC ¶ 45.)

The statement on which Crescent Point relies is set forth in the "Conclusion" section of the Case Study, which section reads, in full:

> Tachyus software has a proven track record of empowering operators to maximize the value of their fields through quantitative optimization. The simple contracting structure and intuitive user interface allows for rapid adoption with minimal time and IT investment, while ensuring sustainability and adoption into existing workflows.

(See Richmann Ex. J at 7.)

Tachyus argues Crescent Point fails to allege facts to support a finding that the above-quoted statement was false. As set forth below, the Court agrees.

Crescent Point first alleges the statement was false for the reason that, on the date Tachyus sent the Case Study to Crescent Point, Tachyus's software "was still in the beta testing phase of its product development process and did not have a workable product on which to base this claim." (See FAC ¶ 46.) The Case Study, however, discloses the basis for its reference to "proven track record," namely, results obtained by clients who has used the software in connection with, respectively, "a mature field" (see Richmann Decl. Ex. J at 4), "an immature thermal field" (see id. Ex. J at 5), and "a middle-of-life thermal field" (see id. Ex. J at 6), and Crescent Point does not allege those clients did not obtain the results set forth in the Case Study.

Crescent Point next alleges the statement was false because, according to Crescent Point, Tachyus "was well aware" that Crescent Point's "waterflooding scenarios were complex" and that "transmitting and uploading" Crescent Point's data into Tachyus's software "could cause the software to crash." (See FAC ¶ 46.) As discussed above with respect to "False Statement #2," however, the Case Study states Tachyus's contracts have "two phases," the first of which is the "Setup period," and that, after the conclusion of the Setup period, "the customer has no commitment to continue" if "predictivity cannot be demonstrated at the end of Phase 1" (see Richmann Decl. Ex. J at 1). In other words, the Case Study cannot be understood as stating that all users would obtain the same type of results as those obtained by the clients discussed in the Case Study, and, indeed, it indicates that some users may not.

Accordingly, to the extent the First Cause of Action is based on "False Statement #7," the claim is subject to dismissal.

g. "False Statement #10"

Crescent Point alleges the Case Study "claimed that Tachyus's Data Physics software enabled engineers to beat their baseline forecasts by ~30% and their best case

by ~20%." (See FAC ¶ 54.)

The statement in the Case Study on which Crescent Point relies is contained on a page setting forth the results one client experienced when using Tachyus's software in "managing an immature thermal field." (See Richmann Ex. J at 5.) In particular, the Case Study states, with respect to that client, "Tachyus software enabled engineers to beat their baseline forecast by ~30%, and their best case by ~20%, generating $7.5MM in annual profit increases." (See id.)

Crescent Point fails to allege any facts to support a finding that the actual statement made, i.e., the results one client experienced when using Tachyus's software in managing an immature thermal field, was false. Although Crescent Point alleges Tachyus knew its software "would never provide" those results for Crescent Point (see FAC ¶ 55), the statement on which it relies does not assert all customers will experience those results.[6]

Accordingly, to the extent the First Cause of Action is based on "False Statement #10," the claim is subject to dismissal.

h. "False Statement #11"

Crescent Point alleges the Case Study "claimed that Tachyus's Data Physics software could increase its customers' revenue by as much as $60 million per reservoir that deployed the software, and help increase and enhance customers' overall oil production." (See FAC ¶ 56.)

As Tachyus points out, the Case Study includes no such statements. Although, as noted, the Case Study does set forth the results three clients experienced using Tachyus's software, the Case Study does not state that any of those clients experienced a revenue increase of $60 million, nor does the Case Study otherwise include any

[6] Crescent Point does not allege its wells are located in an "immature thermal field" (see Richmann Decl. Ex. J at 5) and, indeed, acknowledges the referenced customer's wells constitute "a completely different species from Crescent Point's 'unconventional' wells" (see FAC ¶ 55).

statements predicting the amount of revenue customers will experience, or include language promising customers' overall oil production will increase.

Accordingly, to the extent the First Cause of Action is based on "False Statement #11," the claim is subject to dismissal.

2. Statements Not Contained in "Case Study"

The First Cause of Action is also based on four statements not alleged to be included in the Case Study.

a. "False Statement #4"

"False Statement #4," despite such denomination, actually consists of more than one statement.

First, Crescent Point alleges that, "[f]rom on or June 2017," McNamara told Sinclair and other Crescent Point employees that, in Crescent Point's words, "Tachyus's software was capable of analyzing fracking data for Crescent Point as part of its model." (See FAC ¶ 37.) As Tachyus points out, however, the manner in which the actual statements were made, e.g., email, other writing, conversation, is not disclosed. Moreover, the phrase "from on or June 2017" is ambiguous as to the timeframe in which McNamara made the statements Crescent Point seeks to challenge. Consequently, as to the paraphrased statements by McNamara, Crescent Point has failed to comply with Rule 9(b).

Next, Crescent Point alleges that, on June 15, 2017, in an "exchange[ ] [of] correspondence," Mark Henning ("Henning"), "Tachyus's Principal Geologist," asked Crescent Point to "fill out an 'asset details' spreadsheet that he prepared to start understanding the makeup and characteristics of Crescent Point's wells" and that, as part of his request, he asked for "information and data about Crescent Point's fracking operations." (See id.) According to Crescent Point, it responded "with the information he had requested," including informing Henning that "Crescent Point's oil fields contain 'tight oil reservoirs,' 'tight rock,' and 'natural fractures, folds and faults,'" and that Henning replied by stating "such assets would be included 'in the initial scope of work proposal.'"

(See id.) Crescent Point alleges Henning's reply was the equivalent of "holding Tachyus out as being able to assess such data" (see id.), a statement Crescent Point alleges was false. Tachyus argues the FAC fails to allege Henning's statement was false. As set forth below, the Court agrees.

Although Crescent Point alleges Tachyus, as of June 15, 2017, "had not even tried" to "incorporate fracking data into its model" and did not add a "fracture closure parameter" to its software until several months after the parties had entered into the Agreement (see FAC ¶ 38), Crescent Point does not allege Henning or any other Tachyus employee told Crescent Point, on June 15, 2017, or at any other point prior to the parties' entering into the Agreement, that Tachyus's software had the then-present ability to incorporate fracking data. Indeed, the first phase of the Agreement required Tachyus to "[a]cquire data in order to train the models" (see Richmann Decl. Ex. B at 6), an activity that was not to begin until after the parties' entered into the Agreement.

Accordingly, to the extent the First Cause of Action is based on "False Statement #4," the claim is subject to dismissal.

b. "False Statement #8"

"False Statement #8," like "False Statement #4," consists of multiple statements, in this instance, two statements pertaining to the then-proposed contract being "risk free." (See FAC ¶ 47.) First, according to Crescent Point, McNamara, on May 26, 2017, told Crescent Point "the backtest really is a risk free exercise for CPG [Crescent Point] in that if [Tachyus was] not able to define optimization opportunities [it would] not proceed." (See id. (alterations in FAC).)[7] Second, Crescent Point alleges, that McNamara, in an October 19, 2017, email to Sinclair, stated: "If for some reason there are NOT sufficient opportunities to create value, we will walk away. This is why we term this 'risk free'." (See id. (emphasis in FAC).) Tachyus argues Crescent Point fails to allege facts to

[7] Crescent Point does not identify the individual to whom McNamara made such statement or the type of writing in which it was conveyed.

support a finding that the statements comprising "False Statement #8" were false. The Court agrees.

The terms of the Agreement provide, consistent with McNamara's statements, that, "[i]f Backtest results do not provide feasible opportunities for meaningful financial upside for Crescent Point, Crescent Point, at its sole discretion, may terminate this [Agreement] without paying the Early Termination Fee" and that Tachyus would send "[n]o invoice if Backtest results provide no feasible opportunities." (See Richmann Decl. Ex. B at 10.) Although Crescent Point alleges Tachyus "improperly charg[ed] Crescent Point for its time" (see FAC ¶ 48), an apparent reference to the invoice Tachyus sent Crescent Point and that Crescent Point allegedly paid in "error" (see FAC ¶ 82), the improper issuing of an invoice, standing alone, is insufficient to establish fraud, see Tenzer v. Superscope, Inc., 39 Cal. 3d 18, 30 (1985) (holding "proof that a promise was made and that it was not fulfilled" is insufficient to establish fraud).

Accordingly, to the extent the First Cause of Action is based on "False Statement #8," the claim is subject to dismissal.

c. "False Statement #9"

Crescent Point alleges that, on April 25, 2017, McNamara sent an email to Sinclair and another Crescent Point employee, in which McNamara stated Tachyus's software "could 'automatic[ally] incorporate[e] log data' into the software to enhance 'multi-objective optimization techniques.'" (See FAC ¶ 50 (alterations in FAC).)

In support of falsity, the only non-conclusory allegation Crescent Point makes is that, after the parties began performing under the Agreement, Tachyus's software "failed to store, let alone incorporate or model, any results based on Crescent Point's data" (see FAC ¶ 51), an allegation that is insufficient to support a finding that the statement was false when made, see Tenzer, 39 Cal. 3d at 30.

Accordingly, to the extent the First Cause of Action is based on "False Statement #9," the claim is subject to dismissal.

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d. "False Statement #12"

Crescent Point alleges that, on October 18, 2017, Dakin Sloss ("Sloss"), Tachyus's "co-founder," sent an email to Ryan Girtzfeldt, a Crescent Point employee, in which Sloss stated he was "'confident that using Tachyus at CPG [Crescent Point]' would 'unlock significant production increases and cost reductions in [Crescent Point's] water floods.'" (See FAC ¶ 58 (alterations in FAC).)

Crescent Point alleges Sloss's statement was false when made for the reasons that (1) Tachyus's software had not been "designed to work on horizontal wells or in tight reservoirs," (2) prior to October 18, 2017, the software had not been "tested or modeled on such wells," and (3) that, up to October 18, 2017, Tachyus had "only worked with eight customers before Crescent Point," each of which "had operations that drastically differed from Crescent Point's operations." (See FAC ¶ 59.) Such allegations, however, do no more than support an inference that Sloss was aware Crescent Point's operations differed from Tachyus's then-existing customers' operations, not an inference that Sloss believed Crescent Point would not obtain from the software the benefits he identified in the above-referenced email.

Accordingly, to the extent the First Cause of Action is based on "False Statement #12," the claim is subject to dismissal.

3. Conclusion as to First Cause of Action

For the reasons stated above, the First Cause of Action is, in its entirety, subject to dismissal.

B. Second Cause of Action

In the Second Cause of Action, titled "Breach of Written Contract," Crescent Point alleges Tachyus failed to comply with five provisions in the Agreement.

At the outset, Tachyus reasserts an argument made in support of dismissal of the initial complaint, namely, that Crescent Point cannot bring a claim for breach of contract because, prior to filing suit, it did not comply with the terms of a "Termination" provision in the Agreement. In responding to the motion to dismiss the initial complaint, Crescent

Point did not challenge Tachyus's argument that noncompliance with such provision constitutes a bar to suit, and, consequently, the Court did not at that time consider what effect, if any, the Termination provision had on Crescent Point's ability to bring a claim for breach of contract.[8]

In opposing the instant motion, Crescent Point now contends any failure on its part to comply with the Termination provision is not a bar to bringing a claim for breach of contract. Consequently, the Court now considers that question.

The Termination provision reads as follows:

> Either Party may, at its option, terminate this Agreement in the event of a material breach by the other Party . . . . Such termination may be effected only through a written notice to the breaching party, specifically identifying the breach or breaches on which such notice of termination is based. The breaching party will have a right to cure such breach or breaches within thirty (30) days of receipt of such notice, and this Agreement will terminate in the event that such cure is not made within such thirty (30)-day period.

(See Richmann Decl. Ex. A ¶ 9.2.)

The above provision, as one district court, in considering a substantially similar provision, notes, "allows [a] party to terminate the agreement early due to material breach if the terminating party provides notice and an opportunity to cure," but does not "mention[ ] any obligation to provide notice or an opportunity to cure prior to bringing suit," or, "[i]n fact . . . refer to bringing suit at all." See Advanced Thermal Sciences Corp. v. Applied Materials Inc., 2008 WL 11338614, at 2 (C.D. Cal. July 1, 2008). Under such circumstances, the Court agrees that "the 'Termination' provision applies when one party is seeking to terminate the Agreement because of alleged breach, but does not apply to bringing suit for the alleged breach," see id. (emphasis in original),[9] and, consequently,

[8] In opposing the initial motion to dismiss, Crescent Point argued that it complied with the Termination provision, an argument the Court did not find persuasive.

[9] The authority cited by Tachyus, Tamayo v. Gruma Corp., 2015 WL 5734873 (E.D. Cal. September 29, 2015), is not to the contrary, as the district court therein did not consider whether a failure to comply with a termination provision constituted a bar to a plaintiff's bringing a claim for breach of contract. Rather, the district court considered whether the plaintiff had alleged sufficient facts to support its claim that the defendant breached the contract by terminating the agreement after the plaintiff had timely cured an

finds any failure by Crescent Point to comply with the Termination provision does not bar the filing of a lawsuit for breach of contract. Cf. Gerber v. First Horizon Home Loans Corp., 2006 WL 581082, at *1-2 (W. D. Wash. March 8, 2006) (dismissing claim for breach of contract where plaintiff did not afford defendant opportunity to cure and contract provided neither party "may commence . . . any judicial proceeding until such [party] has notified the other party . . . and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action"). The Court next considers the merits of Crescent Point's claim.

1. Provision Requiring Service "Be Free of Any Defects"

Section 6.1 of the Master Subscription Agreement ("MSA"), one of the three documents comprising the parties' Agreement, provides: "[T]he Tachyus Service shall . . . strictly comply with all applicable specifications, descriptions, and other conditions of this Agreement and any Statement of Work and be free of any defects." (See Richmann Decl. Ex. A ¶ 6.1.)

Crescent Point alleges Tachyus "never provided a software that was 'free of any defects'" (see FAC ¶ 151), in that, according to Crescent Point, during the first phase, Tachyus's software "continuously failed to provide any sort of predictive capacity" (see FAC ¶ 149), was not "a workable product at any point in time" (see FAC ¶ 150), and provided "backtesting results" that were "nonsensical" and "flawed" (see FAC ¶¶ 151-52). Additionally, Crescent Point alleges that, shortly before the deadline to complete the first phase, Tachyus was "nowhere near ready to provide a software model that showed 'feasible opportunity for meaningful financial upside'" (see FAC ¶ 152), and, ultimately, that the parties "never progressed" beyond the first phase (see FAC ¶¶ 79-80).

As Tachyus points out, the above-cited section, contrary to Crescent Point's allegation (see FAC ¶ 148), does not obligate Tachyus to provide a product "free of any defects" (see id.). Indeed, the MSA contains a "Disclaimer" that expressly contemplates

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asserted failure to perform. See id. at *4.

a situation where Tachyus's software might produce errors that would not be "corrected" and would not produce results satisfactory to Crescent Point. (See Richmann Decl. Ex. A ¶ 6.2 (providing "Tachyus does not warrant that the Tachyus Service will meet customer's requirements or that the operation of the Tachyus Service will be uninterrupted or error-free, or that all errors will be corrected").) Consequently, the term "free of any defects," as used in ¶ 6.1 of the MSA, cannot reasonably be interpreted to mean that the software would be free of imperfection or would produce results financially beneficial to Crescent Point. Indeed, the Agreement provides that, during the first phase, Tachyus was to complete a "Backtest" and then "present to Crescent Point the opportunities for optimization," and if there were none, Crescent Point was allowed to terminate the Agreement without making any payment to Tachyus (see id. Ex. B at 10 (providing Crescent Point with right to terminate without payment if "Backtest results [did] not provide feasible opportunities for meaning financial upside for Crescent Point"); see also id. (prohibiting Tachyus from issuing "invoice" if "Backtest results provide no feasible opportunities")), thus expressly contemplating a situation where the software might not produce results satisfactory to Crescent Point.

Accordingly, to the extent the Second Cause of Action is based on Tachyus's alleged failure to comply with ¶ 6.1 in the MSA, the claim is subject to dismissal.

2. Provision Requiring "Tour"

The Statement of Work ("SOW"), another of the three documents comprising the Agreement, identifies five "activities" that were required during the initial part of the first phase, one of which is: "Tour field to understand operational constraints and field operator perspective." (See id. Ex. B at 6.)[10]

Crescent Point alleges Tachyus failed to comply with such obligation, in that it "failed to tour Crescent Point's wells" and "failed to do any of its own diligence on the

[10] The SOW identifies the fields as "the Viewfield, Leitchville[,] and Cantaur fields located in the province of Saskatchewan." (See id. Ex. B at 10.)

unique features of Crescent Point's operations." (See FAC ¶ 63.) Although Tachyus contends "the only conclusion to be draw from [the FAC] is that Crescent Point concluded that a site visit was unnecessary" (see Def.'s Mot. at 16:5-6), no such conclusion is apparent from the FAC, and any defense based on such contention is premature at the pleading stage.

Accordingly, to the extent the Second Cause of Action is based on Tachyus's alleged failure to tour Crescent Point's oil fields during the first phase of the parties' Agreement, the claim is not subject to dismissal.

3. Provision Requiring "Qualified" Personnel

The SOW, in a section titled "Key Personnel," provides as follows:

> Tachyus shall supply personnel who are qualified to perform the services and Work, including Jeff McNamara ("Key Personnel"). Tachyus shall not remove, reassign or replace any Key Personnel in connection with the Work without Crescent Point's prior written consent, unless the engagement of any Key Personnel with Tachyus has been terminated, in which case Tachyus shall promptly replace such Key Personnel with other personnel approved by Crescent Point, who thereafter shall be deemed to be Key Personnel.

(See Richmann Decl. Ex. B at 8-9.)

Crescent Point alleges Tachyus breached the above-quoted provision "by failing to supply personnel qualified to perform the services and work related to developing the Tachyus software for Crescent Point." (See FAC ¶ 155.) In support of such claim, Crescent Point alleges that the "key personnel Tachyus supplied, such as [Garrett] Fowler and [Ken] Lawrence, were incapable of modeling Tachyus's software for tight oil reservoirs, . . . [n]or did anyone else on Tachyus's team have any of the requisite skills and experience to be able to interpret and model data for Crescent Point's use." (See FAC ¶ 156; see also FAC ¶ 158 (alleging Tachyus "outsource[ed] . . . backtesting work to 'offshore' third-party engineers who were unfamiliar with Crescent Point's unique tight oil reservoirs"); FAC ¶ 162 (alleging Tachyus failed to provide competent engineers, "whether outsourced or not").)

As an example, Crescent Point alleges that, at a meeting held in July 2018, i.e.,

six months after the parties began performing under the contract, one of Tachyus's "key personnel" showed Crescent Point "results from its model that suggested Crescent Point use significantly less water production to increase oil extraction," referred to such results as a "'success' for Tachyus's software model" (see FAC ¶¶ 156-57), and, based thereon, made a "recommendation" that Crescent Point "inject significantly less water into the wells than current levels of water injection" (see FAC ¶ 68). According to Crescent Point, advising such use of significantly less water would have been understood as "clearly erroneous" to anyone with "a basic understanding of tight oil production" (see FAC ¶ 157), such advice being "illogical when applied to tight reservoirs" (see FAC ¶ 68). Additionally, Crescent Point alleges that, when Crescent Point's "engineers would point out errors and failures within Tachyus's software," Tachyus's engineers "would reply that they would look into the issue, but never once corrected any of the issues or failures that Crescent Point identified." (See FAC ¶ 75; see also FAC ¶¶ 70-74 (identifying allegedly erroneous information provided to Crescent Point by Tachyus).)

In seeking dismissal, Tachyus points out that "[g]etting a fact wrong at a meeting" does not mean that an employee is "unqualified." (See Def.'s Mot. at 16:2-3.) Given Crescent Point's allegation, however, that the erroneous advice would not have been offered by a person possessing "[e]ven a basic understanding" of the type of oil extraction in which Crescent Point engages (see FAC ¶ 157), as well as its allegations that such error was "not an isolated incident" (see FAC ¶¶ 68-69; see also FAC ¶ 70-74), the Court finds the claim is not subject to dismissal.

Accordingly, to the extent the Second Cause of Action is based on Tachyus's alleged failure to provide qualified personnel, the claim is not subject to dismissal.

4. "No Invoice" Provision

The SOW provides that Crescent Point would not be billed the monthly fee for use of Tachyus's software during the "Setup Phase" and, instead, that Crescent Point would be "invoiced at end of Backtest for entire phase." (See Richmann Ex. B at 10.) The SOW further states: "No invoice if Backtest results provide no feasible opportunities."

(See id.) As set forth above, Crescent Point alleges that, although "the parties never progressed past the Backtesting Phase" and Tachyus had "not shown any feasible opportunities for meaningful financial upside for Crescent Point," Tachyus, in July 2018, sent Crescent Point an invoice in the amount of $1,050,000, i.e., the fee for the first seven months, and that Crescent Point, approximately two months later, paid the invoice "due to an administrative error." (See FAC ¶¶ 80, 82.)

In seeking dismissal, Tachyus relies on a provision in the Agreement stating payments are non-refundable.[11] The provision on which Tachyus relies states that the "[c]ustomer will pay to Tachyus all fees in accordance with the relevant Statement of Work," that "[p]ayment obligations are non-cancelable," and, "except as expressly provided in [the] Agreement, all payments made are non-refundable." (See Richmann Decl. Ex. A ¶ 4.1.) Given Crescent Point's allegation that the Backtest results "had not shown any feasible opportunities" for Crescent Point (see FAC ¶ 82), however, and, assuming, as the Court must, such factual allegation is true, Crescent Point owed no fee under the relevant SOW and Tachyus, in turn, was contractually prohibited from sending Crescent Point an invoice, (see Richmann Decl. Ex. A ¶ 4.1, Ex. B at 10).

Accordingly, to the extent the Second Cause of Action is based on Tachyus's sending an invoice, the claim is not subject to dismissal.

5. "Mutual Confidentiality Obligations" Provision

Under the MSA, "data and/or content posted, transmitted, displayed, submitted, generated, uploaded or otherwise made available to Tachyus through [Crescent Point's] use of the Tachyus Service" is deemed "Confidential Information." (See id. Ex. A ¶¶ 1, 5.3.) Additionally, under the MSA, in a section titled "Mutual Confidentiality Obligations," a party who "receiv[es]" Confidential Information "shall . . . at the disclosing Party's election, destroy or return to the other Party any tangible copies of the Confidential

[11] Tachyus also contends Crescent Point did not pay the invoice in error, a factual argument that is premature at the pleading stage.

Information and permanently delete all electronic copies of the Confidential Information in its possession or control and will certify in writing to the disclosing Party that it completed the foregoing." (See id. Ex. A ¶ 5.2)

Crescent Point alleges that, in a letter dated July 9, 2019, it "sought the return" of its "well and field data" and that Tachyus "failed to return" such data (see FAC ¶ 167), a failure that, according to Crescent Point, constituted a breach of the Mutual Confidential Obligations provision quoted above. In seeking dismissal, Tachyus argues, in essence, that the letter did not include an "election," and, consequently, that Crescent Point has failed to allege facts to support a finding that Tachyus, by not returning the data in response thereto, failed to comply with the Mutual Confidentiality Obligations provision. As set forth below, the Court agrees.

According to the FAC, the following events occurred. On September 10, 2018, and, again on September 13, 2018, Kerry Sandhu, a Crescent Point employee, emailed Tachyus to say Crescent Point had "decided to put the project 'on hold' until Crescent Point and Tachyus could meet to discuss the myriad issues Crescent Point had experienced and to establish a new 'go forward plan'" (see FAC ¶ 86 (emphasis in FAC)), and, after "[s]ubsequent discussions between the [p]arties" (see FAC ¶ 87), Tachyus, on March 6, 2019, sent Crescent Point a "Draft Proposal to Resume Crescent Point Waterflood Optimization," which included Tachyus's proposal to "[u]pdate the existing field backtest model" (see Richmann Decl. Ex. G at 2).[12] Subsequently, by the above-referenced letter of July 9, 2019, Crescent Point responded by stating it "was not prepared to accept" Tachyus's proposal and, instead, was making a "Counterproposal" that it would "forgo [its] claim" for a return of the $1,050,000 payment in exchange for the following: "(i) the payment by Tachyus to Crescent Point of $750,000; and (ii) Tachyus's prompt return of all of the data and information previously provided to Tachyus by

[12] Tachyus's unopposed request that the Court take judicial notice of Tachyus's letter dated March 6, 2019, is hereby GRANTED.

Crescent Point" (see id. Ex. H at 1),[13] which Counterproposal would "remain open for acceptance by Tachyus until 4:30 p.m. on July 29, 2019" (see id.). Tachyus did not thereafter respond to the Counterproposal. (See FAC ¶ 95.)

In sum, the only reference to a return of confidential material was contained in a condition of a Counterproposal that was not accepted. Under such circumstances, Crescent Point fails to plead the requisite election was made.

Accordingly, to the extent the Second Cause of Action is based on Tachyus's alleged failure to comply with the Mutual Confidentiality Obligations provision, the claim is subject to dismissal.

6. Conclusion as to Second Cause of Action

For the reasons stated above, the Second Cause of Action is subject to dismissal to the extent it is based on alleged breaches of the "be free of any defects" and "Mutual Confidentiality Obligations" provisions. In all other respects, the Second Cause of Action is not subject to dismissal.

C. Third Cause of Action

The Third Cause of Action is titled "Breach of the Duty of Good Faith and Fair Dealing."

Under California law, "the implied covenant imposes upon each party the obligation to do everything that the contract presupposes they will do to accomplish its purpose." See Careau & Co. v. Security Pacific Business Credit, Inc., 222 Cal.App.3d 1371, 1393 (1990) (internal quotations and citation omitted). "To the extent [an] implied covenant claim," however, "seeks simply to invoke terms to which the parties did agree, it is superfluous," and the plaintiff's "remedy, if any" is to proceed with a breach of contract claim. See Guz v. Bechtel Nat'l, Inc., 24 Cal. 4th 317, 352-53 (2000).

Here, in the Third Cause of Action, Crescent Point sets forth a series of allegations

[13] Tachyus's unopposed request that the Court take judicial notice of Crescent Point's letter dated July 9, 2019, is hereby GRANTED.

that describe Tachyus's failure to comply with its obligations under the Agreement. (See FAC ¶¶ 179-89.) Although Crescent Point puts particular emphasis of its allegation that Tachyus used Crescent Point's data for the benefit of "future customers" (see, e.g., FAC ¶ 185 (alleging Tachyus "took volumes of Crescent Point's data" and "used such data to develop improvements and enhancements to Tachyus's software for use with future customers")), the propriety of any such alleged use of Crescent Point's data is expressly addressed in the Agreement (see Richmann Decl. Ex. A ¶ 5.2 (providing party receiving "Confidential Information" shall use it "only as permitted by this Agreement")),[14] and, consequently, must be challenged, if at all, in a claim based on the breach of an express term. See Guz, 24 Cal. 4th at 352-53.

Accordingly, the Third Cause of Action is subject to dismissal.

D. Fourth Cause of Action

In the Fourth Cause of Action, titled "Unfair Competition (Cal. Bus. & Prof. Code § 17200) – Fraudulent and Unfair Business Practices," Crescent Point alleges Tachyus has engaged in unfair business practices.

To the extent the Fourth Cause of Action is based on alleged "fraudulent" practices (see FAC ¶¶ 197-211), the claim is derivative of the First Cause of Action, and, consequently, is subject to dismissal for the reasons stated above with respect to the First Cause of Action.

To the extent the Fourth Cause of Action is based on alleged "unfair" practices (see FAC ¶¶ 215-31), the claim is subject to dismissal, as it is wholly based on conduct alleged to be in breach of the parties' Agreement,[15] and § 17200 does not encompass

[14] As set forth above, under the MSA, the "data" Crescent Point makes available to Tachyus is deemed "Confidential Information." (See id. Ex. A ¶¶ 1, 5.3.)

[15] Specifically, Crescent Point alleges the following acts were unfair: (1) Tachyus's "outsourcing work to unqualified 'offshore' engineers for pennies on the dollar" and "never inform[ing] Crescent Point of its outsourcing arrangement" (see FAC ¶¶ 215, 221); and (2) "refus[ing] to return any of Crescent Point's data" and using such data "to further its own commercial goals" (see FAC ¶¶ 229-30).

claims of such nature. See Linear Technology Corp. v. Applied Materials, Inc., 152 Cal. App. 4th 115, 135 (2007) (holding, "where a [§ 17200] action is based on contracts not involving either the public in general or individual consumers who are parties to the contract, a corporate plaintiff may not rely on [§ 17200] for the relief it seeks"; noting § 17200 "was enacted to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services" (internal quotations and citation omitted)); In re Webkinz Antitrust Litig., 695 F. Supp. 2d 987, 998 (N.D. Cal. 2010) (dismissing § 17200 claim where corporate plaintiffs' claim "fundamentally sound[ed] in contract" and failed "to state a connection to the protection of the general public").

Accordingly, the Fourth Cause of Action is subject to dismissal in its entirety.

E. Fifth Cause of Action

In the Fifth Cause of Action, titled "Unjust Enrichment," Crescent Point alleges that, "[d]ue to Tachyus's "fraudulent inducement and fraudulent and unfair business practices," Crescent Point has "grounds to seek rescission of the [p]arties' Agreement" (see FAC ¶ 241), and that, in the event the Agreement is rescinded, Crescent Point is entitled to recover the money and property Tachyus "unjustly" received from it (see FAC ¶ 242). In other words, the Fifth Cause of Action is derivative of the First and Fourth Causes of Action.

Accordingly, as the First and Fourth Causes of Action are subject to dismissal, the Fifth Cause of Action likewise is subject to dismissal.

CONCLUSION

For the reasons stated above, Tachyus's motion to dismiss is hereby GRANTED in part and DENIED in part, as follows:

1. To the extent Tachyus seeks dismissal of the First, Third, Fourth, and Fifth Causes of Action, the motion is GRANTED.

2. With regard to the Second Cause of Action, the motion is GRANTED to the extent Crescent Point claims Tachyus breached the "be free of any defects" and "Mutual

Confidentiality Obligations" provisions.

3. In all other respects, the motion is DENIED.

If Crescent Point wishes to amend for purposes of curing any of the deficiencies identified above, it shall file a Second Amended Complaint no later than February 28, 2022. Crescent Point may not, however, add any new claims without first obtaining leave of court. See Fed. R. Civ. P. 15(a)(2). If Crescent Point does not file a Second Amended Complaint, the instant action will proceed on the remaining claims in the First Amended Complaint.

IT IS SO ORDERED.

Dated: February 10, 2022

MAXINE M. CHESNEY
United States District Judge

United States District Court
Northern District of California